IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
)	ID No.: 0009007758
V.)	CR.A.: IN-00-09-1542-R2, 1252-R2,
)	1526-R2, 1527-R2, 1528-R2 &
)	1529-R2,
EDMUND F. BAILEY,)	IN-00-10-0309-R2, 0310-R2,
Defendant.)	0311-R2, 0312-R2 & 0313-R2
)	

ORDER

Upon Defendant's Third Motion For Postconviction Relief – SUMMARILY DISMISSED, in part¹ and DENIED, in part.

- 1. On October 19, 2009, the court denied Defendant's second motion for postconviction relief. Reargument was denied on November 13, 2009. The second motion turned on *LeGrande v. State*² and *Culver v. State* 's³ retroactivity.
- 2. On December 14, 2010, this court decided *State v. Holden*. So, on December 13, 2011, Defendant filed this, his third motion for postconviction relief. Along with two, procedurally defaulted claims, Defendant argued *Holden's*

¹ State v. Bailey, Cr. ID 0009007758 (Del. Super. Dec. 22, 2011) (Silverman, J.).

² 947 A.2d 1103 (Del. 2008).

³ 956 A.2d 5 (Del. 2008).

⁴ 2010 WL 5140744 (Del. Super. Dec. 14, 2010) (Jurden, J.).

⁵ See State v. Bailey, Cr. ID 0009007758 (Del. Super. Dec. 22, 2011) (Silverman, J.).

retroactivity.

- 3. After preliminary review, the court summarily dismissed the barred claims but it called for the State's response and Defendant's reply as to the *Holden* argument.⁶ The parties complied.
- 4. Defendant's *Holden* argument fails because *Holden* does not apply retroactively and even if it did, it is not on point.
- 5. Holden requires a court order before the police install a tracking device.⁷ As Defendant tacitly recognizes, *Holden* reacts to technological advances. It is a textbook announcement of a new, non-retroactive rule.⁸
- 6. Moreover, as discussed in the several earlier decisions here, Defendant was arrested after the police set up a surveillance camera in a semi-public storage locker across an aisle from a locker used by Defendant for illegal activities. Because the surveillance here was remote and electronic, it bears superficial similarity to *Holden*. *Holden*, however, involved monitoring a suspect's movements whenever and wherever he was on the street. Thus, one of the several critical distinctions between this case and *Holden* is Holden had no way of avoiding the

⁶ *Id*.

⁷ Holden, 2010 WL 5140744, at *8 n. 55 ("This opinion . . . only requires that a warrant be justified and issued before law enforcement may use GPS technology to monitor individuals for a prolonged period of time.").

⁸ See, e.g., Teague v. Lane 489 U.S. 288, 310 (1989).

State's tracking whenever he was driving. Here, as the court repeatedly emphasized,

Defendant could have avoided the police by shutting his locker's door. But, again,

there are other distinguishing facts, e.g. the police did not touch Defendant's locker;

the surveillance only covered the moments when Defendant was at the locker; and so

on.

7. In short, to apply here *Holden* must be extended. On its face and

reasoning, Holden is not controlling. Taking everything into account from this

case's beginning, Superior Court Criminal Rule 61(i)(5) is not triggered by Holden,

nor by its Constitutional underpinning.

For the foregoing reasons, the remaining claim under Defendant's third

motion for postconviction relief is **DENIED**. This is the final order on the third

petition for postconviction relief, which means the appeal period SHALL begin now.

The Prothonotary **SHALL** notify Defendant.

IT IS SO ORDERED.

Date:

June 26, 2012

/s/ Fred S. Silverman

Judge

oc: Prothonotary (Criminal)

pc: Sarita R. Wright, Deputy Attorney General

Edmund F. Bailey, Defendant

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